

Regulatory Governance in Brazil: inconsistent coordination, institutional fragmentation and halfway reforms

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Paper presented at the 4th Biennial ECPR Standing Group for Regulatory Governance Conference, University of Exeter, UK (27 to 29 June 2012)

Abstract

Currently, political and institutional shortcomings rather than economic and technical paucity play a crucial role in the dynamics of the regulatory regime in Brazil. The regulatory state has emerged in the country in the shadow of the developmental state, and an incomplete view of the former has delayed the reconciliation between both. Regulatory governance in turn has been treated in a short-sighted and ad-hoc way, which has seriously compromised its evolution. Over the last years, the country has slowed down the pace of regulatory innovation, and important gaps have been left open. The way forward for Brazil seems to rely heavily on the reassurance of political commitment at the centre of government and on changes in administrative culture. These are pivotal issues if regulatory reforms are to regain momentum in the country.

Keywords

Brazil; regulation; regulatory governance; developmental state; political commitment.

Introduction

The literature on regulatory reforms in developing countries has extensively documented the rise of the regulatory state. However, after a whole generation of regulatory reforms in the developing world it seems no longer accurate simply to group different countries under the same evolution path. Brazil is a particular case that deserves individual analysis in terms of the development of regulatory governance. Although not an OECD country, the largest Latin American economy has made efforts to play by the rich countries' best practices in relation to the regulatory discipline. For the last fifteen years Brazil has been able to build reasonable regulatory capacity, and was comparatively successful in paving the way for a considerably stable regulatory system.

Nevertheless, large shortcomings remain, which are not necessarily a result of lack of economic and technical capacities. For specific reasons closely related to inconsistent coordination and high levels of fragmentation in the government, aggravated by the fact that competencies are sometimes blurred and institutional leadership is at best not clearly defined, Brazil has struggled to complete regulatory reform cycles and to articulate a coherent regulatory governance strategy. In addition, a short-sighted conceptual view of regulation, excessively normative and focused

exclusively on independent regulatory agencies, inhibits a “whole-of-government” approach to regulatory governance.

In light of these issues, the article is divided into four parts. The first section is devoted to the evolutionary path of the Brazilian regulatory regime, putting the country into context and emphasising its most recent phases of New Public Management (NPM) reforms. The second part claims there is a limited conceptual perspective of regulation that has dominated in the country, which has contributed to the slowdown in the regulatory evolution. The third section addresses key institutional shortcomings that have hindered a comprehensive approach for managing regulation and the regulatory system. That is followed by a fourth part where future insights are presented, which are closely linked to the reassurance of political commitment at the highest political level and on changes in administrative culture.

Eventually, it will be possible to conclude that the consolidation of a model of regulatory governance is not only a challenge but also a necessary step for the country to complete its regulatory system, and also to reconcile the developmental with the regulatory state.

1. Evolutionary analysis of the Brazilian regulatory regime

After substantial changes in regulatory governance from mid 1990s to early 2000s, there has been a gradual slowdown in the process of regulatory modernization in Brazil, which is more a political and institutional than an economic factor. Lately the country has hardly innovated in its regulatory regime, opting out of the most recent regulatory innovation tendencies, regardless of the orientation. Neither economic driven adjustments through cost-benefit analysis nor real improvements with respect to social participation in the regulatory discipline have been formally introduced in the country, just to name two. Indeed, Brazil has not engaged in any of the three reform trends of the current age, in the way they are described by Wegrich (2012). First, Brazil has not yet fully subscribed to the “text book approach” of regulatory impact assessment (RIA) promoted mostly by the OECD and the World Bank nor, second, to the “too much red tape approach” of regulation simplification and regulatory guillotine. Third, Brazil has not moved in the direction of the “democratic governance approach” (Radaelli and De Francesco, 2010) because societal actors’ participation in the rule-making process has not been called upon more intensely¹.

Debates over regulatory governance have become increasingly restricted to specific circles and communities, and dependent upon patchy governmental initiatives, notably the PRO-REG (Programme for the Strengthening of the Institutional Capacity for Regulatory Management). In an ambitious endeavour, PRO-REG was launched² in 2007 in cooperation between the Civil House of the Presidency, the Ministry of Planning, Budget and Management and the Ministry of Finance, which initially shared its administration. The Inter-American Development Bank (IDB) has supported financially the programme. However, what was once a promising and vigorous initiative has backslidened and especially in the last two or three years has lost considerable political support. To date, PRO-REG has been unable to pave the way for the set-up of a formal

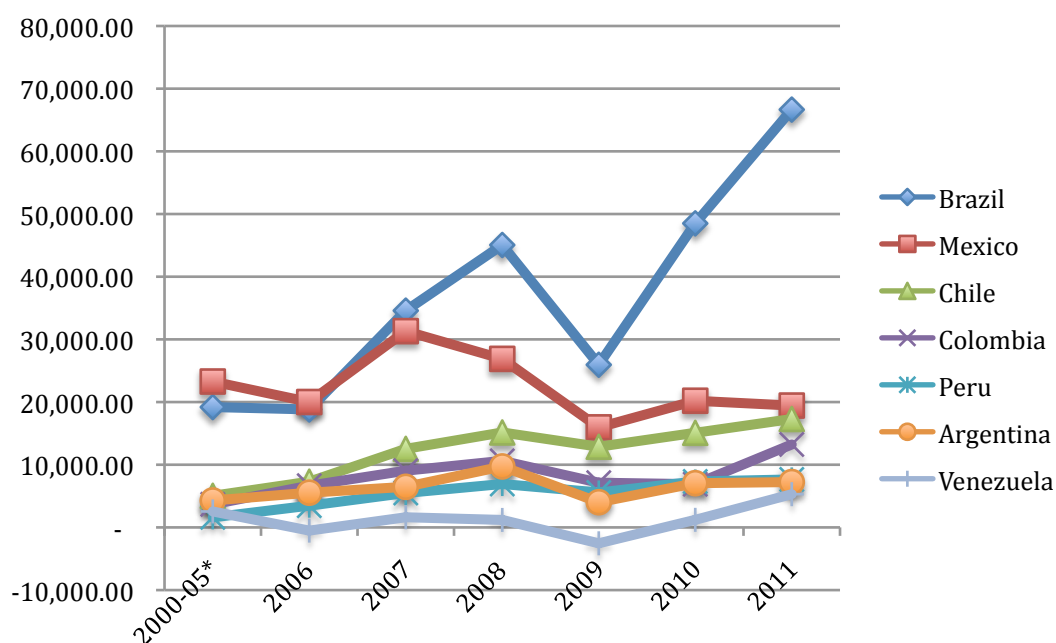
¹ Faria and Ribeiro (2002) recall that the Brazilian democracy has not yet engendered enough social participation to promote changes in the bureaucratic stances.

² Under the Presidential Decree number 6.062, 17th March 2007.

unit of co-ordination, oversight and evaluation of regulatory process in the executive federal branch in Brazil, which was its ultimate goal (OECD, 2011a: 17)³.

Coincidentally or not, such a stagnation has happened at a time of growing influence of Brazil in the international stage, when the country has stepped in to dispute “the appropriateness of the ‘globalization ideology’” (Baldwin *et.al.*, 2012: 413). Furthermore, it is noticeable that not even the current global financial crisis was able to bring the issue of regulatory governance back to the political agenda, for Brazil has suffered only minor scratches (OECD, 2010). Amongst its neighbouring countries, Brazil has been performing considerably well. In some instances, it has in fact pulled away from other major economies in Latin America, as shown by the figures of foreign direct investments presented below. If ‘institutions matter’, that is, if a reliable business environment and stable rules are pre-conditions for the enhancement of competitiveness, Brazil has been recognised from the perspective of investors as a much safer harbour for international investments than its counterparts in the sub-continent, including the OECD members Chile and Mexico.

Chart 1 – Inward Foreign Direct Investments in Latin American major economies 2000-2011 (in US\$ million)



Source: Own depiction based on data from CEPAL (2011)

* simple average

In a situation where supposedly everything goes reasonably well in the economy and the headlines turned far less pessimistic than they once were, whereas a wave of

³ According to the assessment made by the PRO-REG for the OECD Regulatory Management Indicators, the Programme “envisages the conception and set-up of a unit of co-ordination, monitoring and evaluation of regulatory processes in the executive branch”. However, it has not been implemented yet.

strong governmental intervention particularly towards infrastructure investments⁴ set the tone of public policies, regulatory governance has received scant political attention. Overall, it is argued that the consequences of a given pattern of governance tend to be discussed more vividly in circumstances of reform (Lynn, 2003), which is not the case in Brazil at present. Clearly, awareness of the issue of regulatory governance has entered a downward trend in the most recent years while international dependence, both economic and political, has decreased.

By contrast, if one is to widen the focus of the analysis beyond the borders of Latin America, it may be noticed that Brazil has not performed as well globally as it has done regionally, in which respect regulatory governance may well be implicated. From 1970 to the recent years, the participation of Brazil in the global rank of foreign direct investments has dropped from 6,5% to around 2%, with a spike of 4% during the most intense periods of privatization in mid to late 1990s (Gonçalves, 2011). Another relevant proxy in this respect are the Doing Business figures, where once again Brazil lags behind economies of similar sizes. Even though it is necessary to acknowledge the methodological limitations of the Doing Business Indicators, they have been widely used to promote reforms and consequently are worth of note. In light of this, it is relevant initially to take into consideration that in 2011 Brazil ranked 126 among 183 countries in the Doing Business estimations (World Bank, 2011). All the BRIC countries⁵ appear ahead of Brazil, except India.

These figures combined point to some important directions. On the one hand, they might suggest that regulatory reforms and governance have been overstated by commentators and policy makers as Brazil has delivered consistent results without fully engaging in a strategy of regulatory modernization. Such line of thought would be reinforced by the fact that manufacturing and service industries have received much of the international foreign investments in the country, accounting for 46% and 44% in 2011 respectively, with particular importance to highly regulated sectors like mining and telecommunications (CEPAL, 2011).

On the other hand, however, such a scenario may raise doubts about the level of sustainability of the Brazilian current performance, as institutions in general and regulation in particular have not advanced at an equivalent pace, which may impact on investor's confidence in the country at some point. Yet, a more obvious conclusion is that Brazil could propel recent economic achievements by building on regulatory governance innovations, so long as the project is to catch-up with the biggest global economies. Ultimately, those figures also indicate that at present it seems with little explanatory power simply to group Brazil under the Latin American label to run general assumptions as to different national contexts. As far as regulatory governance is concerned, Brazil deserves an individual assessment, for the predominantly state centred developmental regime has not yet come to grips with the need for better regulatory governance.

Nevertheless, regulatory changes remain a complex issue because to some extent there has been resentment with the way regulatory reforms were made in the 1990s, when regulation entered the public management vocabulary in Brazil. At that

⁴ The Growth Acceleration Programme (PAC – Programa de Aceleração do Crescimento) has possibly been the single most important programme of the current administration of the President Dilma Rousseff. It was launched in 2007 and renewed as PAC-2 in 2010 aiming at tackling poor infrastructure in Brazil thorough public investments in excess of half a trillion dollars. Its main priorities are sewerage, transport, energy, housing and water services.

⁵ BRIC countries are Brazil, Russia, India and China, plus South Africa.

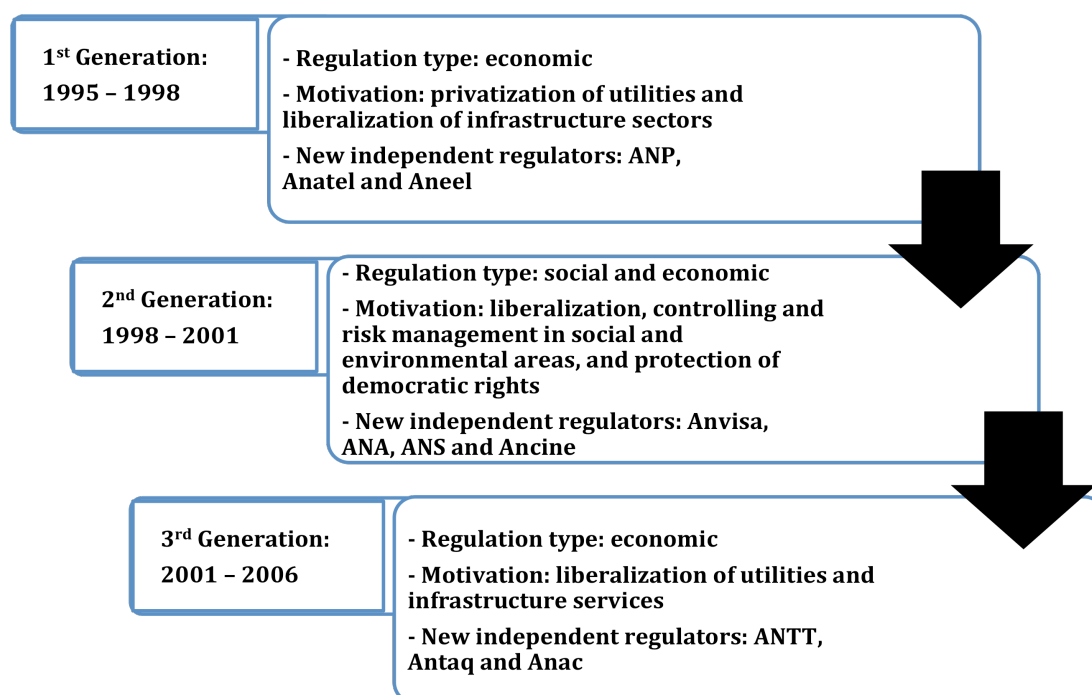
time Brazil embraced orthodox policies, which turned regulation, touted as technocratic, into an enterprise of the neo-liberals, or at least something largely recognised as such. From that point on, regulation has been wrongly treated in a short-sighted way, which has overshadowed the need for a whole-of-government type of regulatory governance and delayed wider changes (Faria and Ribeiro, 2002; Peci and Sobral, 2011). Brazil has not been able to overcome outdated debates in the field, which has curtailed the advancement of its regulatory regime. Although the general assumption is that better regulation programmes have been carried out by different types of public administrations, including left of centre governments (Radaelli and Meuwese, 2009), Brazil is at a crossroads to date because those type of programmes tend to initiate only when the deregulatory phase is completed and settled (Ragazzo, 2011; Foss Hansen and Holm Pedersen, 2006).

Back in the early 1990s regulatory reforms became a key political goal. Unlike the current economic situation, Brazil was on the brink of a financial collapse when the Fernando Henrique Cardoso administration launched a wide-ranging civil service reform (Bresser-Pereira, 1996; Manzetti, 1999). On that occasion, and following the leading political economic thread of the time, the national (federal) government subscribed to liberal recipes, most of them demanded as conditionalities by international organizations and lenders (Weyland, 2006; Baldwin *et.al.*, 2012). Privatization in particular was taken up very enthusiastically, and was accompanied by the building-up of the first independent regulatory agencies in the country. Reforms were theoretically grounded in the mainstream of the time and resembled earlier NPM forays made in the developed world (Farias and Ribeiro, 2002). The design of the new regulatory regime had the British and the American experiences as principal models (Bresser-Pereira, 2004).

The diffusion of regulatory agencies in Brazil initiated precisely at the time when right leaning economic reforms were at their highest in the developed world. Overall, regulatory reforms in the whole Latin America were made possible due to severe economic crisis coupled with channels of ideological influence from Europe and the US (Bresser-Pereira, 1996). Moreover, there were loud calls by prominent intellectual streams, influential peers and group dynamics in the sub-continent which resonated locally criticisms against the existing structure of the State and demanded modernization (Levi-Faur and Jordana, 2005). Similarly to what went on in the developed world around the 1980s and the 1990s, in Latin America there was sheer opposition by economic theorists contending that 'private initiative was superior to *dirigismo* in goals of economic growth' (Manzetti, 1999: 06). The then predominant thesis was that States had been unable to cope with democratic needs and social demands, and that the providing and distributing branches had to be reconciled with the steering function of the State. Clearly, a line of argumentation attuned to explanations for the rise of the regulatory state in the developed world (Majone, 1994, 1997; Lodge, 2001; Loughlin and Scott, 1997; Moran, 2003; Estache and Wren-Lewis, 2010).

Like elsewhere in the developing world (Lodge and Stirton, 2002; Gutierrez, 2003), in Brazil privatized industries and utility sectors were the first to accommodate sector-specific regulators. Only at a subsequent stage, industries other than those undergoing privatization received equivalent regulatory structures. Drawing on Martins (2006) studies, it is possible to recognize three trends in the creation of regulatory agencies in Brazil, which also mark different generations of independent regulators in the country. Figure 1 details these stages.

Figure 1 – Generations of Brazilian federal independent regulatory agencies



Source: adapted from Martins (2006)

Note: ANP (*Agência Nacional do Petróleo*) is the petroleum, biofuels and natural gas regulator; Anatel (*Agência Nacional de Telecomunicações*) is the telecommunications regulator; Aneel (*Agência Nacional de Energia Elétrica*) is the electricity regulator; Anvisa (*Agência Nacional de Vigilância Sanitária*) is the health surveillance regulator; ANA (*Agência Nacional de Águas*) is the water regulator; ANS (*Agência Nacional de Saúde Suplementar*) is the supplemental health regulator; Ancine (*Agência Nacional do Cinema*) is the audiovisual regulator; ANTT (*Agência Nacional de Transporte Terrestre*) is the regulator for land transportation; Antaq (*Agência Nacional de Transportes Aquaviários*) is the waterway transportation regulator; and Anac (*Agência Nacional de Aviação Civil*) is the civil aviation regulator.

The ten independent regulatory agencies created along those three generations remain the selective group of federal independent regulators. They were created to tackle various issues, and resting on both national patterns and external influences (Levi-Faur and Jordana, 2005). According to Martins (2006), the first generation of agencies came to light amid privatization of crucial utility sectors and, in the case of ANP, as a result of liberalization of the oil industry, which until then had been predominantly a monopoly of the state-owned Petrobras. In the second generation the policy orientation was more about regulating social and environmental areas, due to liberalization, risk management and rituals of verification (Power, 1999). The third generation embraced infrastructure sectors that had not being included in the privatization programme years before. Some of them had been liberalized or have had their provision handed over to the private sector, sometimes in co-operation with public bodies.

All of these federal agencies have been set up based roughly on the same model. They have also been equipped with a few important tools common in more advanced regulatory regimes as well as recommended by international organizations as benchmarks, as they:

- originated from laws;
- have been separated from the ministerial structure, and made administratively and technically independent from direct political control;
- have been granted directors' mandates not coincident with that of the president;
- have had managerial considerable leeway, as their human resources and financial administration were largely under their control;
- have had to respect accountability and transparency requirements, and to implement mechanism of public consultation.

Therefore, most of the official discourse which underpinned the conception of independent regulatory agencies worldwide justified similar projects in Brazil. Indeed, to some extent the group of new regulators was considered capable of assuring credible commitment and to boost private investments (Levy and Spiller, 1994, 1996). The scale of the Brazilian privatization programme is an indication of that, as it has involved sales of public assets in excess of US\$ 80 billion, which made it one of the largest of its kind in the global history (Mueller *et.al*, 2008).

Nonetheless, after the initial stage of reforms, there has been an accommodation in the existing regulatory regime. Over the time, the federal government has found ways to somewhat circumvent formal independence of regulatory agencies, increasingly subject to budgetary control as well, and to discipline them in relation to the priorities of government (Ragazzo, 2011; Meirelles and Oliva, 2006; Pacheco, 2006). Regulatory agencies in turn have treated regulatory governance at their convenience, with occasional voluntarism and well-intentioned efforts, yet without practically any co-ordination among each other. This is ineffective and may yield even more inconsistency to the system as a whole (Noll, R. 1999).

2. Conceptual analysis of regulatory governance

In order to avoid definitional problems and allow for the complete realization of the institutional context that offers foci for this article, attention should be given to its boundaries. Here the concept used to define regulation is not as narrow as in the Latin American usual parlance. Regulators in turn are not only the organizations labelled as such and indeed as regulatory agencies as a result of privatization or liberalization ventures, as has hitherto been the norm particularly in Brazil (Peci and Sobral, 2011). In addition, the regulatory function is not necessarily limited to utility regulators, which is another erroneous simplification commonly made in the country⁶. Although agencification and regulation have gone in tandem, and that they constitute one of the chief policy choices of the regulatory state era (Christensen and Laegreid, 2006; Lodge, 2008), in this article regulation will be more functionally than formally or legally referred to. This distinction is important because in the Latin American institutional landscape regulatory concepts are not straightforward, and are sometimes inconsistently applied. In Brazil, the term 'regulation', in its equivalent in Portuguese (*regulação*), became a jargon in the public management vocabulary during the privatization process, when similar terminologies were imported (Faria and Riberio, 2002; Peci and Sobral, 2011). This partially explains the semantic misapplication.

⁶ For a thorough analysis of regulatory governance in the infrastructure sector in Brazil see Mueller *et.al*, 2008.

Moreover, for the purpose of having a better explanatory analytical framework it will suffice to limit the scope of investigation to the regulation exercised by governmental organizations, for innovative techniques such as smart-regulation, meta-regulation, system-based and performance-based regulation (Gunningham and Grabosky, 1998; Braithwaite, 2003; Coglianese and Lazer, 2003; Coglianese *et.al.*, 2003; May, 2007) have not gained credence in Brazil to date. In other words, regulatory governance, understood as a set of mechanisms that societies use to manage regulation (Veljanovski, 2010), will be assessed from the perspective of public organizations tasked to maintain formal control over social or economic activities and agents, and to enact to influence them through the medium of mechanisms of standard-setting, information gathering and behaviour modification (Hood *et.al.*, 2001). More precisely still, in order to attach a better sense to the discussion, regulatory governance will be conceptualised as follows:

“[Regulatory governance is] a holistic term that refers to the systematic implementation and operation of government-wide policies on how to use regulatory powers to produce quality regulation within the procedural values of the governing system (such as democratic processes). Good regulatory governance is grounded in the view that ensuring the quality of regulation is a permanent and essential role of government, not a one-off set of improvements, and that institutional capacities should be designed around a clear view of the appropriate use of regulation in society” (Jacobs and Ladegaard, 2010: 7)

Although the objective in this paper is to further the interpretation of regulatory governance in Brazil taking into consideration a broader view of its regulatory regime, it is undoubtedly of pivotal relevance to shed light on the process of consolidation of independent regulatory agencies in the country. Regulatory agencies determined the formation of the Brazilian regulatory state, which as of the appearance of the first independent regulators was couched mostly in a normative view of regulation (Faria and Riberio, 2002; Peci and Sobral, 2011). The legal shifts that allowed independent regulatory agencies to be set up in Brazil plainly point to a doctrinal view of regulation as being a task of a ‘slim state’.

However, the economically oriented approach became slightly less radical during the creation of second generation regulators such as ANS and ANCINE, although not causing the mainstream to change. ANCINE, for instance, whose mandate includes the regulation of content related issues in the audiovisual industry aiming for diversity and media plurality, notably in the case of the Pay-tv market, and the registering, licensing, monitoring and steering, alongside funding, of the film industry, is occasionally questioned in its condition as a regulator because it allegedly fail to match up to the standard model of regulation, i.e. the market failure template (Oliveira *et.al.*, 2004)⁷. This theoretical and practical view that draws a straight line between market failure and regulation has long being questioned, particularly as regards media regulation (Mike Feintuck 2006, 2010; Sunstein, 1990).

The narrow view of regulation which has dominated in Brazil from the 1990s onwards has lied largely on the public interest theory (Croley, 2007), which was reinforced by the context wherein the regulatory reform was forged in the 1990s, that

⁷ Even when the bulk of ANCINE’s activities was related to the public funding for the film industry, which has not been the case since normative shifts widened the regulatory competencies of the body, the agency exercised mechanisms of standard setting, behaviour modification and information gathering in relation to that market, principally through registering, licensing, monitoring and steering tools.

is, largely as a result of simple transfers of know-how in a sort of taken-for-grantedness or snowball global effect (Thatcher, 2002). However, that theoretical approach may prove just too generic if one is to articulate a more accurate assessment of the current regime of regulatory governance in the country. Firstly because “conditionality requirements in particular encourage the adoption of blueprints that are inappropriate or insensitive to the particularities of any political context” (Baldwin *et.al.*, 2012: 412), which makes technocratic intention to subsume regulation solely to the economic logic doomed to incompleteness. Secondly because the regulatory discipline involve intangibles that make ‘depoliticization’ impossible to achieve (Flinders, 2004), in so far as both social and economic goals as well as political and institutional aspects of regulation determine the size, shape and form of a given regulatory system (Haber, 2010), which may be a more sensitive issue in developing countries. Minogue (2008), reflecting on NPM reforms in emerging economies, clarifies this point in the following way:

“[...] where the neoliberal reform model has the characteristics of a uniform prescription and blueprint, local cultural variations mean that each transfer will be made into unique social, political and legal and administrative contexts, and will end either in being rejected, or converted into some kind of hybrid, with the consequences generally unpredictable in advance.” (Minogue, 2008: 199)

In a more practical sense, conceptual limitations have had consequences on the demarcation of the Brazilian regulatory state, which matters a great deal if the governance of the regime is to be fully grasped. Historically in Brazil, like in the rest of Latin America, there has been a tradition of constant regulatory action for decades. As explained by Jordana (2012), public bodies with limited functions of stimulating certain fields and reducing social risks constituted the first real regulators set up in Latin American countries many years before the 1980-90 reforms.

In Brazil some federal regulators without most of the characteristics of the new agencies, including the managerial and budgetary independences, have endured over time and remain crucial. The paramount examples are the Brazilian Central Bank, the securities commission *Comissão de Valores Mobiliários* (CVM), the environmental watchdog *Instituto Brasileiro do Meio Ambiente* (IBAMA), the private insurance services regulator *Superintendência de Seguros Privados* (SUSEP), and the *Instituto Nacional de Metrologia, Qualidade e Tecnologia* (INMETRO), which covers trading standards, weights, measures and products safety. All of them are to a great extent single purpose organisations separated from the ministerial structure, although their managers or directors do not serve fixed and stable mandates, and similar mechanisms of autonomy do not apply to them. Other previous regulators have ceased to exist but were active and relevant in the past, such as the *Instituto Brasileiro do Açúcar e do Alcool* and the *Instituto Brasileiro do Café*, which were tasked with price, entrance and production regulation for the sugarcane and alcohol, and the coffee industries respectively.

As much as regulation has not started in the country with liberalizing reforms in the 1990s the Brazilian regulatory state has not lent itself entirely to the international benchmark in this respect, especially in comparison to the Majone’s description (1994, 1997). Essentially, the term ‘regulatory state’ retains its traditional idea in the Brazilian context as a phenomenon that gave rise to a series of radical market-centred and efficiency-type transformations at the heart of the State. Such a notion has considerable force so long as the ‘regulatory state’ amounts to an analytical construct, as contended by Yeung (2010), and not merely a normative ideal of a minimal state to correct market failures. Indeed, the regulatory state does offer a canvas onto which the institutional pattern of the current Brazilian regulatory regime can be depicted.

The incompleteness of the regulatory state in Brazil is not an exclusivity amongst the developing countries (Lodge and Stirton, 2002; Gutierrez, 2003). The Brazilian idea of regulatory state has prevailed in specific institutional spaces, yet without replacing the traditional developmental state, akin to the positive state. It follows that the regulatory state in Brazil is also explained by what it has not acquired so far. Undoubtedly, the central (federal) government has not relinquished its strong power to tax and spend, and redistribution and fiscal policies top the governmental agenda predominantly ever since the subprime crisis broke out. In fact, the present political economy standard may be closely associated with the functioning of a Keynesian state, which is in stark contrast to the Majorian view of the regulatory state.

Furthermore, being a federation, Brazil presents the classical problem of balancing the devolution of powers to states (provinces) and municipalities (towns). As contended by Ingram and Schneider (2006: 181), while devolution arguably may bring implementation and service delivery structures closer to local people, their actual impact upon them varies widely. In the country's case, several competencies have been assigned under the law to the two sub-national levels, each of them with their own incentives and capabilities as regards regulation. In an empirical study of a group of 31 state independent regulators, Melo *et.al.* (2010) concluded that the level of autonomy each state agency possess varies substantially from state to state, and that the main motivation for delegation would be the opportunity gains an incumbent governor would obtain by nominating his or her allies to leading positions, thereby determining agencies' medium and long-term plans, and tying the hands of the next administration. What is more problematic as to regulation is that states and municipalities carry out the task without any coordination or integration with the federal government (Rezende, 2000). In areas of health, water and sewerage, and even public transportation, regulation is somewhat split between the three federal levels, and coordination between them, if any, tend not to touch common regulatory governance plans.

These structural and formational issues add complexity to an environment of ad-hoc and episodic federal governmental actions, which have contributed to maintain the regulatory state trapped in incomplete conceptual paradigms. At the same time, even in the case of the federal independent regulatory agencies, the flagship of the Brazilian regulatory state, their functioning appears defective and stuck in first wave reform's rows concerning basic regulatory tools, legitimacy and institutional locus (Radaelli and Meuwese, 2009). Agencies keep detached from regulatees and constituents as well, thereby increasing formalism and bureaucracy in the relationship with them, restraining responsiveness (Ayres and Braithwaite, 1992).

If it is certain that public management models are not supposed to evolve steadily and with no going back, to the extent that they involve a succession of U-turns and policy shifts, as taught by Hood (1998), Brazil has clearly made a retreat as far as regulatory governance is concerned. The major challenge ahead is to pursuit the reconciliation between the developmental and the regulatory states as their different languages have been slowing the pace of regulatory innovation. The country has left behind more serious stages of technical and financial international dependency, and it seems no longer adequate neither to import generic blueprints nor to maintain the strabismic view of regulation, which inhibits a broader perspective. As pointed out by Estache and Wren-Lewis (2010), there is as much incoherence to advocate for a regulatory framework that is close to some universal ideal as there is in the design of regulation without any understanding of a country's institutional context

3. Institutional shortcomings in the Brazilian context

The regulatory activity of the Brazilian state has been constant over decades, either as a positive (developmental) or a regulatory State (Mattos, 2006). Yet, a traditionally interventionist role of the State in the economy has made use of regulation to preserve the public interest and to promote economic growth until now, leading to ask the extent to which regulation in Brazil is more an instrument to improve market efficiency or a tool to define the intrusion degree of the State in society to implement a developmental approach. Despite the fact that evidence suggests that over the years regulation in Brazil has tended to be less restrictive or rigid,⁸ that does not imply that regulation does not continue to have an interventionist character.

This debate, which has not been fully realised in the Brazilian case, leads to an additional enquiry on the possible institutional shortcomings that have contributed to hamper the development and consolidation of regulatory governance in the country. Regulation has been dealt with mostly from a purely economic point of view, resting extensively on the public interest theory, and not from a public governance perspective (Croley, 2007; Dos Santos, 2009). As the former reflects only a sub-set of the relevant issues, it makes more difficult to debate at the political level the way forward for regulatory governance in Brazil.

The intention to disentangle the regulatory and the policy function has not been totally accomplished in Brazil, not only because delegation has suffered from imposing limitations to the autonomy and independence of the regulatory agencies, but also because the governance arrangements do not facilitate a proper functioning of the regulators from a whole-of-government perspective. Regulatory agencies frequently formulate public policies, in the absence of capacities at the ministerial level. That overlapping between more interventionism and political functions on one side and regulatory on the other has contributed to hamper the development and consolidation of regulatory governance in Brazil.

The adoption of a model that had been established in most developed countries with relative success, particularly following the US and the UK examples, was seen not as a means but as an end in itself, keen to automatically create a regulatory governance system that was going to solve most of the problems related to regulatory and market failures as a matter of fact. Given that, this section concentrates in identifying and explaining the institutional shortcomings that hinder a comprehensive approach for managing regulation and consolidating a regulatory governance system in Brazil. The various shortcomings identified throughout this paper are presented more extensively in the following sections.

3.1. High levels of fragmentation

The particularities of the institutional configuration in Brazil have played a key role in defining and shaping a regulatory governance system. The consolidation of democracy reaffirmed a presidential system based on a strong Executive, but confronted to a fragmented multiparty Legislative. In the current political scene, the President exerts great control, including over regulatory policies. The degree of delegation is a

⁸ According to the OECD Product Market Regulation (PMR) Indicators, which measure the degree to which policies promote or inhibit competition in areas of the product market where competition is viable, Brazil had a score indicator on aggregation of 1.982 (index scale from 0 to 6 from least to more restrictive), which is more than the OECD average, but less than the rest of BRIC countries. (See www.oecd.org/economy/pmr)

decision made by the chief of the executive, i.e. President or governors in their respective jurisdictions, rather than the Legislative, which is generally weak (Santos e Batista, 2010). The fragmented multiparty system in Brazil gets reflected in the government configuration in the following way: the elected President negotiates with a wide range of relatively minor political parties their support on a number of issues, among them the control of ministries. Ministers are therefore politically appointed, which ensures that the governing base supports government's proposals in the Parliament.

As a consequence and despite of having a relatively common political platform with the President, in general ministers enjoy freedom to define the way their ministries should operate, unless in the case of highly sensitive areas of government, where even second and third bureaucratic tiers have to gain acquiescence at the presidential level. The norm then is that ministers from political parties that belong to the "government base" follow rather their own political agenda. For the functioning of ministries, this has an important impact. Most key positions in ministries are politically appointed, and ministers use that political power to increase the recruitment channels for the government (Pó, 2009:70). Over the four-year presidential mandate, there is normally erosion in ministries' capacities, which is accentuated by the change of government after new elections.

In that logic, ministries tend to be technically weak and for regulatory purposes the creation of independent regulatory agencies accelerated this trend, as they have a rather learned and stable technical staff and their creation was supposed to highlight the relevance of technical decisions (Mueller and Pereira, 2002). Indeed, regulatory agencies have managed to hire specialised experts as part of differentiated public contests. According to the Brazilian National Audit Tribunal (TCU), there has been a steady increase in the expenditure related to regulatory agencies' staff. In spite of this, the audit tribunal clarifies that this does not assure any specific tendency for the future as independent regulators have only partial control over their budgets, which is mostly a decision of the central government (TCU, 2011).

At the same time, the debate on the particular institutional set-up of regulatory agencies, the autonomy of their bureaucracies, and the power delegated to specialised bodies, but not democratically elected, is still open in Brazil. Most of the debates, including in the Judiciary, still concern the normative power of agencies and their mandates (Ragazzo, 2011). Moreover, the issue of oversight of that type of regulators has not been resolved (Peci and Sobral, 2011). As for other institutions with regulatory powers, little attention has been paid to institutionalise mechanisms that could improve their regulatory functions. In this case, levels of both autonomy and capabilities vary substantially between regulators, ranging from highly proficient and stable bodies such as the Central Bank and the Securities Commission (CVM) to poorly equipped and institutionally weak like IBAMA (the environment watchdog). Deficiencies in autonomy and capacity curtail state's ability to regulate appropriately and to ensure reasonable levels of compliance, even if laws are adequately drafted (McAllister, 2010).

3.2. Blurred competencies

Regulation is not a standalone undertaking. Rather, it is the product of the combination of efforts and outputs of different instances in subsequent or concomitant stages. In Brazil the regulatory network has added complexities, as competencies come from blurred capacities unevenly distributed. This is true with respect to the relationship between federal, state and municipal governments and, within the former, the coordination in the whole public administration structure.

Organizationally, institutions such as ministries, *autarquias* and regulatory agencies, which are formally classified as *autarquias especiais* (special *autarquias*), have regulatory powers and contribute actively to the increase of the stock of regulation at the federal level in Brazil. The Brazilian public administration is however divided between direct and indirect administration. That means that institutions with regulatory powers might belong to different type of administrative entities, having a differentiated way to relate to the centre of government and subject to respond to different administrative mechanisms.

In terms of regulatory powers, ministries are part of the direct administration, while independent regulatory agencies and *autarquias* fall under the indirect administration, as these two do not report directly to the President unless demanded otherwise. Legally, ministries design public policies and co-ordinate, on programmatic grounds, regulatory agencies' and *autarquias*' plans. But as if it were only a question of terminology, it is not uncommon in Brazil that independent regulatory agencies are seen the main, and maybe only, bodies in charge of regulation. PRO-REG, the sole governmental initiative constituted to carry out better regulation projects, was conceived within this frame. Despite the fact that law proposals or decree drafts are normally initiated by ministries and other governmental institutions, regulations are considered a matter of regulatory agencies, which in theory should mainly be responsible for secondary regulations. The terminology problem has been highlighted in previous sections of this paper and contributes to the confusion of who should be considered as part of regulatory governance arrangements.

Baldwin and Cave (1999) explain that regulatory agencies are part of a wider group of regulators. According to them, regulatory agencies could be placed in the group of the main public regulators, together with Parliaments, courts and tribunals, central government departments, and local authorities. Additionally, in Brazil, even though it is expected that ministries prepare the big lines of policy orientation, and *autarquias* and regulatory agencies implement policies through regulations, policy guidance and regulations are however done by all institutions. Ministries do not always have the technical expertise to define policies and regulatory institutions end up designing some of the policies in a given sector.

Those blurred competencies of “*who-regulates-what*” makes the debate on regulatory governance in Brazil challenging and puzzling. For many years the discussion has focused exclusively on the role of the independent regulatory agencies, neglecting several institutions that regulate important areas and policy fields. This narrow view has led to the politicisation of the debate on how regulators should coordinate among themselves and with their line ministries and the government as a whole, and which improvements should be made to ensure that proper governance arrangements are in place.

3.3. Weak Institutional leadership

In Brazil, institutional coordination remains in the President's office and its coordinating unit, Casa Civil (Civil House). Coordination is ensured by various mechanisms, such as cabinet meetings, tasks forces and working groups. Further, there are committees or commissions which normally deal with a specific subject or area, but rarely integrate ancillary sectors and categories of actors.

An initial effort to address some of the institutional vacua in the set-up of regulatory agencies in Brazil was made through the proposal of Law No. 3.337, sent to Congress in 2004, that aimed “to redefine the responsibilities of the agencies, and to

better qualify the concept of autonomy, reinforcing the fact that agencies need technical autonomy and capacities to implement their regulatory and enforcement functions, but not to develop the definition of public policies” (Dos Santos 2009: 185). That controversial proposal for a general law for the regulatory agencies, which would benefit co-ordination and facilitate the consolidation of a regulatory system in the country but has been criticized for being intrusive and prone to thwart regulatory agencies’ independence, ceased to be debated and is very unlikely to pass in the Congress in the near future.

An additional effort to develop a regulatory governance system in Brazil was the set up in 2007 of the PRO-REG, mainly financed by a loan from the Inter-American Development Bank (IDB). In the hands of Casa Civil, PRO-REG has tried to introduce a broad programme for regulatory quality in the country, inspired mainly on international experiences and new trends in OECD countries. The OECD Regulatory Reform Review of Brazil, conducted just after PRO-REG had been established and published in 2008, contributed to raise awareness about the need to discuss regulatory governance issues and helped the programme to find an international reference to its various actions. As in other countries, OECD regulatory reviews may help to legitimise and benchmark national regulatory approaches against the ‘good practices’ advocated by that international organisation and its community, but the extent to which countries are eventually able to innovate in regulatory practices depends largely on their capacities and disposition to turn demands for change into actual policy changes (Lodge 2005: 654).

In that sense, PRO-REG’s results so far have been modest, considering the lack of concrete institutionalisation of good regulatory practices in the administration and in the disposition of the various regulatory actors to introduce real changes. However, PRO-REG has been reasonably successful in mobilising a group of actors with different interests and managed to discuss with them the relevance of regulation and its quality. In many senses, PRO-REG has facilitated the inception of bottom-up initiatives rather than top-down approaches to discuss regulatory governance issues in the country, as it has enabled some institutions to start thinking about the use of new tools to interpret regulation and to reshuffle some of the current regulatory practices.

Political leadership at the centre of government is needed if PRO-REG is to be maintained or transformed in an institution in charge of coordination, oversight and monitoring of regulatory quality in the country. As most international experiences show, introducing changes in the administrative and regulatory culture has to be supported at the highest political level (World Bank, 2010), and Casa Civil seems a natural institution in the Brazilian administration to take the lead in this respect, which could possibly be somehow shared with the Ministry of Planning, Budget and Management, the Ministry of Finance and other specific departments. However, the risk of failure is high as there has been ambiguity on the part of regulatory agencies and the centre continues to focus too much on them, leaving aside other bodies which equally produce and exercise regulation. The incapacity to involve actors of the direct administration, such as ministries, shows the weaknesses of a fragmented system.

Additionally, without a general framework on the regulatory agencies, PRO-REG may shrink even more or fade away completely if the debate over regulatory governance does not regain momentum in the country. Meanwhile, without anything else than the PRO-REG, Brazil has practically frozen its regulatory evolution and keeps performing badly in international comparisons (OECD, 2011a; World Bank, 2011).

3.4. Limited use of regulatory policy tools

Generally, tools and instruments used by governments for public policy reasons have managed to stand for decades (Hood, 2007). Their proliferation in various areas of public policy, such as regulation, is noticeable and they are normally strategically selected by governments to either promote the development of depoliticised formulas in “new governance” or to foster powerful mechanisms for the control and direction of behaviours (Lascoumes and Le Gales, 2007).

Regulatory and policy tools for improving regulatory governance are, however, relatively new to the Brazilian administrative context, at least in a systematic way and with a clear-cut target in mind. The country has never established a burden reduction programme neither decided to introduce regulations only if net benefits to society exceed the costs, for instance. Equally, societal participation has remained generally weak as there has not been enough emphasis on that, nor the objective of widen regulatory society is in play. These particular choices have never been made by the Brazilian government. Most tools, if existent, are used on an ad-hoc basis because of the lack of a comprehensive approach and a coordination body in charge of guaranteeing their use.

The lack of such a comprehensive approach to regulatory management has resulted in a clear deficit in the use of techniques that can improve the efficiency and effectiveness of regulations. Yet, it can also be seen as a consequence of the inability of the Brazilian government to increase its legitimacy by introducing credible tools where bureaucracies not only tick-the-box as part of the routine (Radaelli, 2005). This reveals some issues. First, that each regulatory institution prepares and implements regulation in its own way. Even among regulatory independent agencies the variation degree in the use of certain tools is enormous.⁹ The absence of a quality control mechanism that could oversee and monitor the proper use of tools, and train the regulators on the use of them, facilitates the dispersion of practices among regulators. Second, it shows that the weight of political interference in the whole regulatory process tend to remain high, which makes it difficult to break a regulatory culture that relies heavily on decisions taken with limited public participation and not always based on technical evidence.

In addition, a strong deficit in transparency and consultation with affected parties contribute to the move away of the regulatory process from collective demands. Even if some regulatory agencies have made progresses in the use of consultation, and in some cases notice-and-comment consultation techniques are compulsory for particular institutions, there is little evidence that public participation contributes to shape regulations at early stages of the process. Likewise, the exchange of information with external actors, including civil society, are not recognised neither as a means to gain legitimacy from society nor as a learning vehicle.

A more systematic use of regulatory tools is being currently discussed in Brazil thanks to the PRO-REG efforts. The implementation phase, however, shows the intrinsic challenges for this process, as current regulatory governance arrangements do not facilitate the assimilation of tools that require administrative changes neither the debate about the overly legalistic approach to policy and regulation formulation.

⁹ The use of public consultation, for instance, is revealing. Some regulatory agencies have practices close to those of developed countries, while others hardly conduct consultation with affected parties.

4. The future of regulatory governance in Brazil

The evolution of regulatory governance in Brazil, either by introducing new formal cooperation mechanisms between regulators and the centre or by using particular strengthening tools, such as RIA or wider public consultation practices, will depend heavily on the capacities to break institutional inertia and better conceptualise the role of regulation in policy-decision making. The construction of a “high quality regulation” or “better regulation” agenda requires a “whole-of-government” perspective to the life-cycle of regulation (OECD, 2002; Black, 2007; Radaelli, 2010), which Brazil is trying to consolidate through the PRO-REG. This will also depend on overcoming the dichotomy between developmental and regulatory states as well as moving beyond first wave stages of regulatory reform, as better regulation programmes prosper typically when essential regulatory tools and functions are already in place (Radaelli, 2009).

This section discusses possibilities of shaping regulatory governance in Brazil, considering the institutional shortcomings already presented, and concentrating on two elements that seem to be essential for possible arrangements: the political commitment at the centre and the way this would be used to consolidate relationships with institutions with regulatory powers, and the change in the administrative regulatory culture in the country.

4.1. Political commitment

Political commitment to introduce changes is essential to consolidate a regulatory governance system in Brazil. A key challenge is how to create that support and how to keep it over time. PRO-REG is now the only central reference to discuss regulatory governance issues and promote regulatory management reform in the country. Much will depend on the political support PRO-REG receives, and on the evolution of the programme and its ability to convince regulators of the need to embrace new practices.

An initial question that is worth addressing is the extent to which an institution in charge of promoting regulatory quality would be necessary in the Brazilian context. Literature acknowledges the relevance of institutions to promote change and regulatory reform (OECD, 2002; Cordova-Novion and Jacobzone, 2011), but evidence in the Brazilian case shows that such an institution might not be, per se, a solution to ensure political commitment over time. Having such an institution at the centre of government and ensuring political commitment from the top is not everything (Wegrich, 2010). Transforming the programme into something more institutionalised might be relevant to signal that regulatory governance issues are in the political agenda, but building on additional preconditions might be needed to consolidate a regulatory governance system.

In particular, the question on how to move from the discursive to the implementation level would not be simply solved with the creation of a new body in charge of regulatory reform or passing a law formally introducing new practices. Political commitment, irrespective of the degree of institutionalisation, has to respond to questions about the dynamics of current arrangements and to propose solutions to key issues, such as improvement of coordination, institutional alignment, capacity-building in regulatory institutions, etc. For all such instances, regulatory governance requires a strong centre that steers and coordinates the activities of government regulators (Black, 2007).

So far the discussion at the political level about a comprehensive programme on regulatory reform has not taken place. This might be explained by a lack of political pressure from various stakeholders, such as the private sector or organised consumers' voices, which could play a role in demanding improvements in the regulatory process. It could also be a consequence of too complicated questions being asked, because there is no agreement on what type of regulatory approach is needed and which the core principles of regulatory practices should be. Essentially, not sufficient attention has been drawn to the issue, and the greater the visibility of a regulatory matter and the inherent pressure from stakeholders and the electorate, the greater the political interest in enacting in the correspondent direction (Eisner et.al., 1999). Just like any other political decision, and with more emphasis in the case of substantial institutional changes, regulatory reforms are a consequence of political play and interests mobilization.

As there is no full commitment to introduce a comprehensive "better regulation agenda" or a "whole-of-government" approach to regulatory quality at the highest political level, the strategy seems to be to continue with gradual improvements in the regulatory process in some institutions, notably regulatory agencies, through the use of a limited range of new tools. Besides being ineffective, it is also superficial. For that, regulatory agencies should not be entirely blamed as if they were solely self-preserving agents. As clarified by Noll (1999: 20), the explanation in fact lies not in the interest of the agencies, but in the willingness of elected political officials to allow them to behave in a specific way.

4.2. Changes in the administrative culture

In addition to political commitment, changes in the administrative culture, not only in the regulatory bodies but also at the centre of the government, are needed to modify the approach to regulation and to build a more efficient regulatory governance system. The extent to which PRO-REG is able to convince other institutions to follow new principles for regulatory management will impact on the sustainability of the process.

PRO-REG has supported the introduction of regulatory tools, such as RIA, and the improvement of existing ones, like public consultation mechanisms. Other tools contained in the regulatory governance toolbox, such as simplification programmes or measurement of administrative burdens, have not been contemplated so far. In addition, another crucial substantive topics and gaps have been neglected, such as specific needs of small companies, citizens and consumers, regulatory overlaps, and regulatory coherence with wider public policies, including cross or multisectoral policies (OECD, 2011b). In that sense, as Radaelli and Meuwese (2010: 138) have pointed out, "when agreement on substantive issues of institutional power is impossible [...] leaders turn to procedures (or meta-instruments)." The Brazilian case exemplifies this tendency by insisting in disciplining a sub-set of instruments and flows in a sub-set of regulatory institutions, mainly the regulatory agencies.

Trends in improving transparency mechanisms and make regulatory decisions more technical-based can be observed in some regulatory agencies participating in the PRO-REG approach. However, it is not easy to break administrative practices that hamper a quicker evolution towards a more efficient regulatory system if there is no decision to incorporate ministries, other key institutions and stakeholders in the process, i.e. to adopt the currently missing "whole-of-government" approach. In addition, embedding new regulatory practices, for instance through the use of RIA, will depend much on the sense of legitimacy developed among stakeholders and various

institutional actors, which in turn makes social legitimacy at least as relevant as efficiency (Radaelli 2005).

Changing the administrative culture is also a learning process for both the centre and regulatory institutions. For PRO-REG in particular, it would mean to better identify coordination issues, as well as to strengthen its own technical capacities. For regulatory institutions, it would mean to restructure their internal processes, to identify technical and information gaps that would need to be addressed and to reshape the relationship with affected parties, in particular users and consumers. In particular with RIA, it would be essential to avoid that the instrument became a tick-the-box exercise, as it has happened in many other countries, even advanced economies (Radaelli, 2009).

If the political commitment is to increase, it has to be accompanied by strategic decisions in terms of the type of regulatory governance system that Brazil would like to promote. In that sense, defining the purpose and goal of regulation is vital, and the conceptual discussion presented at the beginning of this paper would need to be addressed. The way the country would embrace regulatory practices is also fundamental, as well as the main strategic approach of where new regulatory practices should lead to. The move from changing administrative regulatory practices to consolidate a regulatory governance system would have to be discussed at some point to ensure regulation is an instrument for economic growth and social development.

Conclusion

The Brazilian regulatory regime is analytically a hard-to-pin-down blend of institutional and political dynamics, actors and interests. Its evolutionary path has been constrained not only by economic underdevelopment, an inefficient State and excessive red tape, which is usually the case with Latin American nations. Intrinsic administrative and political patterns together with technical and theoretical dependence and a distinct mix of influences mostly from the American and European traditions have played possibly a greater role. Notwithstanding the qualitative evolution in the field along the last two decades, regulatory reforms undertaken in Brazil largely in accordance with the New Public Management (NPM) doctrine have lost impetus over time and remained incomplete and superficial.

In this article it has been shown that regulation and indeed regulatory governance have been treated in a short-sighted and episodic way in Brazil. After the period of privatization and the subsequent creation of the first independent regulatory agencies in the 1990s and early 2000s, when international blueprints were basically transferred to the country, Brazil has kept trapped in ideological paradigms that have delayed further regulatory innovations. Currently, there is excessive concern about regulatory agencies at the expense of other bodies with regulatory powers, including ministries, which inhibits a “whole-of-government” approach to regulation. Overall, patchy governmental initiatives have not succeeded in optimising and simplifying the regulatory process nor in turning it more democratic and answerable to social demands.

The way forward for Brazil, it has been argued, rests on a reassured political commitment to better regulatory practices, which includes support for structured and wide regulatory policies at the centre of government. Additionally, administrative culture has to be reassessed to improve coordination and integration linkages. Ultimately, the major challenge for the country at the moment is to reconcile the renaissance of a strong developmental state, comparatively successful over the last decade, with much-needed improvements in its regulatory system. In so doing, Brazil

would be neither importing blueprints nor denying international tendencies, but rather sketching its own regulatory governance model.

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